STATE OF MICHIGAN

COURT OF APPEALS

KATHY SUE KLUNGLE, Plaintiff-Appellee,	UNPUBLISHED March 9, 2004
v	No. 240404 Kent Circuit Court
MARK CURTIS KLUNGLE, Defendant-Appellant.	LC No. 99-003846-DM

Before: Meter, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce based on an arbitration award. He alleges that the circuit court should have vacated or modified the arbitration award because the arbitrator committed various valuation errors, exceeded the scope of his authority under the arbitration agreement, and acted with a bias in favor of plaintiff. We affirm.

I. Facts

On April 22, 1999, plaintiff filed a complaint for divorce against defendant, alleging, among other things, that (1) she and defendant married in 1981; (2) they had three children together, ages thirteen, seven, and five; and (3) there had "been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed[.]" She asked for a division of property and sought sole custody of the children, with defendant to be allowed reasonable parenting time. She also asked "[t]hat an injunction issue against defendant restraining him from coming to or remaining at the plaintiff's place of residence [the marital home], except for the purpose of picking up or delivering the children[.]" In an accompanying affidavit, plaintiff alleged that defendant had been physically abusive to her and to one of the children and that he had threatened to "make [her] life hell" when she previously filed for divorce in 1997. The court filed an ex parte restraining order on April 26, 1999, preventing defendant from, among other things, abusing plaintiff or hiding assets.

The proceedings quickly became rancorous. On May 6, 1999, defendant filed a "sworn statement" in which he denied ever abusing plaintiff and claimed that he would be the better caregiver to their children. He also filed a counter-complaint on that date, alleging that he should be given sole custody of the children.

The court issued a "temporary order for support, custody and injunction" on May 13, 1999. Among other things, it granted physical custody of the children to plaintiff but allowed defendant certain parenting time. The order also "converted" the ex parte restraining order into a "temporary restraining order . . . bind[ing] both parties[.]" On June 22, 1999, plaintiff filed a motion alleging that defendant had violated the restraining order in various respects, such as by abusing plaintiff and returning the children late from visits with him. On June 30, 1999, the court suspended defendant's parenting time and referred the issue of parenting time to the Friend of the Court office. On August 23, 1999, after reviewing the report from the Friend of the Court office, the court modified the parenting time order in certain respects. The court entered numerous modified orders in the subsequent months in an attempt to resolve further disputes between the parties.

On March 8, 2001, the court entered a "Stipulation and Order for Binding Arbitration." The order provided that the parties would submit all issues related to their divorce to an arbitrator. The order stated that "[t]he parties further stipulate and agree that the arbitrator in this case will be Ronald J. Kooistra." The arbitrator issued a temporary decision with regard to parenting time on June 29, 2001, indicating that additional parenting time issues would be "reserved for further decision by the arbitrator."

On July 27, 2001, before any additional arbitration sessions occurred, defendant filed a motion to vacate the order compelling arbitration. Defendant stated that the arbitrator was present during a circuit court hearing on July 20, 2001, concerning plaintiff's attempt to reinstate a personal protection order (PPO) against defendant. Defendant stated:

> At the commencement of the motion, the attorney for the Plaintiff told the court that the arbitrator was present in the courtroom and clearly used the arbitrator in an attempt to win his motion. This arbitrator had been out of the courtroom on several occasions, but had clearly returned in an effort to be present at the time of this hearing. While the arbitrator did not have an opportunity to speak, it was clear that he was there to bolster the Plaintiff's position. This appearance in the courtroom on behalf of the Plaintiff clearly presents a situation that does not reflect the appropriate neutrality that must be present for an arbitrator.
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> Mr. Klungle is not willing to proceed with the arbitration when he considers the fact that it certainly appears that the arbitrator is biased on behalf of the Plaintiff. When the arbitration was first explained to all parties prior to the commencement of the first day of arbitration, the arbitrator firmly stated that he would not be subpoenaed and would not be subject to helping either party. The only reason the arbitrator would go into court would be to explain what was meant by a certain provision of any order that may be reached. Now, several weeks after such explanation, it clearly appears that the arbitrator appeared in court on behalf of the Plaintiff to assist her in her attempt to at least continue a personal protection order against the defendant. This appearance of impropriety clearly warrants a delay in any further proceedings until Mr. Klungle has had an opportunity to present his case to the circuit court for the court to hear the attached motion.

Plaintiff responded on August 1, 2001, stating that "[t]he arbitrator was present in the courtroom awaiting a docket call of a Motion on a case he was handling, not related to the instant matter." She stated, "It was pure happenstance that Ron Kooistra was in the courtroom during oral argument of plaintiff's Motion on the PPO issue." Plaintiff attached to her response an affidavit from her attorney, Michael Quinn, in which Quinn denied having anything to do with the arbitrator's having been in the courtroom on July 20, 2001. Plaintiff also attached to her response an affidavit from Kooistra, who agreed that he appeared in the courtroom on July 20, 2001, for an unrelated matter. Kooistra stated that nothing he heard on the date in question had affected his objectivity with regard to the divorce proceedings.

On August 21, 2001, the court issued an order denying defendant's motion to vacate the order compelling arbitration. In ruling from the bench, the court stated that it found Kooistra "eminently qualified to conduct this arbitration." The court stated, "[b]ased on the affidavits that I have here and what actually occurred in the courtroom, I find that there was no impropriety. There was no misconduct." The court came close to reprimanding defendant for even making the allegations about impropriety, but it stopped short of finding defendant's motion "completely frivolous."

The arbitrator issued his opinion on November 14, 2001. The court denied defendant's motion to vacate or modify the arbitration award[1] and entered a judgment of divorce on January 18, 2002. On February 2, 2002, defendant filed a motion for reconsideration, alleging that he had "discovered new evidence that the Arbitrator was not impartial and/or was biased in favor of Attorney Quinn and this information should have been disclosed to Defendant's counsel." Defendant attached to his motion an affidavit stating, among other things, that he researched the divorce cases handled by Quinn and found that of the fifteen cases filed between 1997 and 1999 that proceeded to arbitration, Kooistra served as the arbitrator in thirteen of them. On March 4, 2002, the court ruled as follows with regard to the motion for reconsideration:

> [D]efendant's motion for reconsideration is denied because it presents the same issues previously ruled on by the Court. The Court finds no palpable error by which the Court and parties have been misled or that a different disposition of the motion must result from correction of the error. The allegations of bias and partiality contained in defendant's brief could have been raised when the Court addressed defendant's previous allegations of arbitrator bias. Moreover, all of the facts underlying defendant's argument were available to him before he made the decision to select this arbitrator. Defendant's statistical analysis fails to persuade the Court that the arbitrator was biased or partial.

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[1] The arbitrator did clarify certain of his rulings after issuing his November 14, 2001, opinion. For example, he admitted that a certain business valuation was inadvertently omitted from a particular column of numbers in the opinion but that the end result (the sum of the column of numbers) was correct. He also further explained his reasoning regarding the valuation of the business in question.

The parties then proceeded to engage in numerous rancorous disputes concerning the enforcement of the judgment. In both the circuit court and in this Court, defendant moved for a stay of execution of the judgment, but both motions were denied. Defendant now appeals.

II. Miscalculations and Other Mistakes

Defendant first argues that "there were evident miscalculations and mistakes in the arbitrator's opinion." He claims that the arbitrator erred in assigning values to numerous items of property and in calculating defendant's child support obligations. However, "[j]udicial review of a binding arbitrator's award is strictly limited by statute and court rule." *Krist v Krist*, 246 Mich App 59, 66; 631 NW2d 53 (2001). As stated in *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999):

> [U]nder MCR 3.602, the parties are conclusively bound by the decision of the arbitrator absent a showing that the award was procured by duress or fraud, that the arbitrator or another is guilty of corruption or misconduct that prejudiced the party's rights, that the arbitrator exceeded his powers, or that the arbitrator refused to hear material evidence, refused to postpone the hearing on a showing of sufficient cause, or conducted the hearing in a manner that substantially prejudiced a party's rights. MCR 3.602(J).

The *Konal* Court went on to state that "[the] defendant has not alleged any of these grounds, but rather claims that the arbitrator erred in his factual findings and calculations. Claims that the arbitrator made a factual error are beyond the scope of appellate review." *Konal, supra* at 75. Here, because defendant's first issue on appeal concerns alleged mistakes with regard to the arbitrator's factual findings and calculations, the issue simply is not amenable to our review. *Id.*

We acknowledge that MCR 3.602(K)(1)(a) states that a court may modify an arbitration award if "there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award." Defendant argues that we must review various valuations made by the arbitrator because they constituted "evident miscalculation[s]."[2] We do not agree. Indeed, it is clear to us that MCR 3.602(K)(1)(a) is referring to simple mathematical miscalculations evident from the face of the award, e.g., a clearly erroneous addition of a column of numbers. The court rule does not empower us to review an arbitrator's decision to value a piece of property in a certain manner. See, e.g., *Konal, supra* at 75, and *Krist v Krist*, 246 Mich App 59, 66-68; 631 NW2d 53 (2001) (discussing the limited nature of a court's review of an arbitration award). To the extent the circuit court might have believed otherwise in seeking to review certain valuations, it erred; any error in this regard, however, was harmless, given that the court did not in fact modify the arbitration award.[3] The arbitrator

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[2] Defendant also seems to suggest that there were "evident mistake[s] in the description of . . . a thing[] or property referred to in the award." See MCR 3.602(K)(1)(a). However, his arguments do not focus on erroneous descriptions, but rather on erroneous valuations. Again, we will not review the arbitrator's factual findings or calculations. *Konal, supra* at 75.

[3] As stated in note 1, *supra*, the *arbitrator* (but not the court) did alter certain of his rulings after (continued…)

explained his rulings in the November 14, 2001, arbitration award and in his further clarifications, and we simply cannot second-guess his mental reasoning. See, generally, *Krist, supra* at 66-68, and MCR 3.602(J)(1) ("[t]he fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award[]").

III. Exceeding Authority

Defendant next argues that the arbitrator exceeded his powers in setting the parenting time schedule for defendant and in failing to assign a value to the household furnishings and jewelry retained by plaintiff. As stated in *Detroit Automobile Inter-Ins Exchange v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982), "arbitrators can fairly be said to exceed their power whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." To justify a vacation of the arbitration award, any error must be evident from the face of the award and be so material that it substantially affected the award. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). Moreover,

> an allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators' decision. Stated otherwise, courts may not substitute their judgment for that of the arbitrators and hence are reluctant to vacate or modify an award when the arbitration agreement does not expressly limit the arbitrators' power in some way. [*Id.*]

With regard to the parenting time issue, defendant claims that the arbitrator erred by altering the parenting time schedule agreed upon by the parties during the divorce proceedings. Specifically, defendant argues that the arbitrator erroneously "eliminated the Defendant's overnight visitation on Tuesday evenings and also eliminated his Thursday night visitation. He also changed the summer visitation which gave the majority of time for July and August[] to the Defendant." Defendant claims that the alteration of the parenting time schedule clearly violated MCL 722.27a, which states, in part:

> (1) Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.
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> (2) If the parents of a child agree on parenting time terms, the court shall order the parenting time terms unless the court determines on the record by clear and convincing evidence that the parenting time terms are not in the best interests of the child.

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issuing his November 14, 2001, opinion.

Defendant claims that "[t]he Arbitrator's failure to continue this parenting time in accordance with the statutory requirements of the parenting time agreed upon by the parties pursuant to MCL 722.27a[] indicates that this was an error in law by the Arbitrator, requiring that this decision be vacated."

We find no merit to defendant's claim concerning parenting time. First, the stipulation and order for binding arbitration signed by the parties stated that "[t]he parties . . . stipulate and agree . . . to submit any and all issues in dispute or controversy in the . . . matter, including . . . parenting time . . . to binding arbitration." Therefore, the arbitrator acted within the scope of his authority in setting a parenting time schedule. Indeed, the stipulation and order for binding arbitration did not place limits on the arbitrator's authority with regard to the determination of a parenting time schedule. See *Gordon Sel-Way, supra* at 497 ("an award will be presumed to be within the scope of the arbitrators' authority absent express language to the contrary"). Moreover, we discern no violation of MCL 722.27a. Indeed, the parties had not in fact agreed on a final parenting time schedule as contemplated by MCL 722.27a(2). Instead, they submitted the issue of parenting time to the arbitrator, and defendant's attorney admitted, at the January 4, 2002, hearing concerning defendant's motion to modify, correct, or vacate the arbitration award, that "both parties wanted more parenting time." The arbitrator also clearly stated that the issue of a final parenting time schedule was in dispute. Accordingly, as noted by the circuit court at the January 4 hearing, whether a particular parenting time schedule comported with the best interests of the children under MCL 722.27a(1) was a question of fact for the arbitrator to decide. We will not disturb the arbitrator's factual findings on appeal. *Konal, supra* at 75.[4]

With regard to the issue of household furnishings and jewelry retained by plaintiff, defendant contends that the arbitrator erred in assigning them no value. In his opinion, the arbitrator stated that "[n]o differential in property settlement is made for furnishings[5] retained by Plaintiff." In a letter dated December 11, 2001, the arbitrator clarified his decision to assign no value to the furnishings by stating the following:

> The Opinion does not put any specific award value to furnishings retained by Plaintiff. No value was offered at arbitration other than Defendant's which I didn't find credible. Because most furnishings are retained for the benefit of the children and because I had nothing of substance to base a value [on], I choose [sic] not to speculate.

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[4] At any rate, we note that the arbitrator, in the section of his opinion concerning parenting time, mentioned that defendant had assaulted plaintiff and appeared "to have little insight into the cause of problems, nor does he take ownership for any of the many confrontations between the parties (or problems with [the eldest child])." The arbitrator's modification of the parenting time schedule was justified in light of the specific findings that he made.

[5] The arbitrator made no separate findings with regard to jewelry. Evidently, the reference to "furnishings" encompassed both the furnishings *and* jewelry, i.e., the household contents. Indeed, defendant, in his appellate brief, makes no attempt to separate the issue of jewelry from the issue of furnishings but instead essentially intermingles the two.

Defendant claims that the arbitrator exceeded his authority in assigning no value to the household contents because the failure to value the items was contrary to this Court's decision in *Lee v Lee*, 191 Mich App 73; 477 NW2d 429 (1991), a divorce and property settlement case. We discern no clear violation of *Lee*.

In *Lee*, the trial court stated that it would order the marital home sold, with the proceeds to be divided, if the parties did not stipulate to the home's value or present expert testimony with regard to its value. *Id.* at 75. This Court concluded that the trial court erred in requiring either a stipulation or expert testimony regarding the value of the home. *Id.* at 75-76. Here, the arbitrator did not require either a stipulation or expert testimony regarding the value of the household contents. He simply concluded that defendant's testimony regarding their value was not credible and that the contents should remain with the home because they largely benefited the children. In reaching these conclusions, the arbitrator did not violate the portion of *Lee* discussed above.

Also at issue in *Lee* was the value of the defendant's pension. *Id.* at 76. The trial court awarded the pension to the defendant because "no evidence of the value of the pension was presented[.]" *Id.* at 75. This Court stated the following:

> Plaintiff also contends that the trial court abused its discretion when it failed to treat defendant's pension as an asset to be divided, inasmuch as the parties had agreed that the pension was a marital asset even though there was no evidence of its value. While we do not excuse the parties' failure to introduce evidence of the pension's value, given their stipulation that it was a marital asset, we hold that the trial court should have divided the pension as it did the other marital assets. Because we are remanding this case for reconsideration of the property division and alimony issues, we direct that the parties be permitted to introduce evidence of the value of the pension at that proceeding. [*Id.* at 76.]

We cannot conclude that the arbitrator clearly violated this portion of *Lee*. Indeed, unlike the situation in *Lee*, the arbitrator in the instant case gave an additional reason, besides the lack of a credible valuation, for failing to divide the household contents between the parties. He stated that the contents should remain with the home because most of them benefited the children. Seeing as plaintiff had primary custody of the children, the arbitrator apparently believed that she should retain the household contents.

As noted in *Ackerman v Ackerman*, 163 Mich App 796, 807; 414 NW2d 919 (1987), "[t]he objective of [a] property settlement is to reach a fair and equitable division in light of all the circumstances. Such division need not be equal, it need only be equitable." Here, a determination of the most equitable division was the arbitrator's task. Indeed, "[t]he fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm . . . [an arbitration] award." MCR 3.602(J)(1). We agree with the circuit court, which referred to the decision with regard to the household contents as "a judgment call

that was made by the arbitrator."[6] The arbitrator made his judgment call. In doing so, he did not violate *Lee* and therefore did not exceed his authority by acting "in contravention of controlling principles of law." See *Gavin, supra* at 434. Nor did the court violate *Byington v Byington*, 224 Mich App 103; 568 NW2d 141 (1997), another case cited by defendant. Indeed, *Byington* dealt with whether a particular asset should be considered part of a martial estate. See *id.* at 113. Here, there was no dispute regarding whether the household contents were part of the marital estate; the arbitrator simply chose to award that part of the estate to plaintiff. The arbitrator did not act in violation of legal principles, and we find no basis on which to vacate the arbitration award.

IV. Bias

Defendant lastly claims that the arbitrator failed to act with impartiality. Under MCR 3.602(J)(1)(b), a court must vacate an arbitration award if "there was evident partiality by an arbitrator appointed as a neutral [person]."

In support of his "bias" argument, defendant first lists several findings by the arbitrator that defendant characterizes as unfavorable. Defendant contends that the arbitrator evidenced bias by ruling against him on several specific points. This argument is untenable. First, as noted above, we will not review an arbitrator's factual findings on appeal. *Konal, supra* at 75. We will not allow defendant to obtain a review of the arbitrator's factual findings simply by couching his argument in terms of arbitrator bias. Second, at the time defendant filed his motion for reconsideration, the circuit court had already ruled with respect to the arbitrator's factual findings. In denying the motion for reconsideration, the court stated that the motion was denied because "it presents the same issues previously ruled on by the Court." The court did not err in making this ruling. Indeed, MCR 2.119(F)(3) states that "[g]enerally, . . . a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." Third, the arbitrator's rulings were not so extremely one-sided that they evidenced bias or antagonism. See, generally, *Cain v Dep't of Corrections*, 451 Mich 470, 496; 548 NW2d 210 (1996) (judicial rulings alone are generally insufficient, in themselves, for a finding of bias).[7]

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[6] We acknowledge, from a commonsense standpoint, that certain furnishings and jewelry would clearly not be used for the children's benefit. However, there apparently was insufficient evidence from which the arbitrator could determine a proper value to be placed on the specific items not used by the children. Moreover, we reiterate that it was the *arbitrator's task*, and not ours or the circuit court's, to determine the most equitable division of property. See, e.g., MCR 3.602(J)(1). Reversal is unwarranted.

[7] Defendant also argues that the arbitrator made disparaging comments toward defendant (below, defendant alleged, specifically, that the arbitrator called him a "jerk") and that the arbitrator acknowledged at the arbitration hearing that he had not read materials submitted by defendant. Defendant made these same allegations in conjunction with his motion to modify or vacate the arbitration award. Plaintiff disputed the allegations. The allegations essentially involved matters of credibility, and the court evidently rejected the allegations, given that it denied defendant's motion to modify or vacate the arbitration award after holding a hearing with respect to the

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Defendant further contends that his "research" established the lack of impartiality of the arbitrator. He states that Kooistra had been the arbitrator in fourteen of nineteen arbitrated divorce cases handled by plaintiff's attorney, Quinn, and filed since 1997. He also states that "Attorney Quinn prepared the Judgment on ten of the eleven cases that he arbitrated with Ron Kooistra between December 14, 1999[,] and August 3, 2001. Arguably, he did so because he was the prevailing party in all of these cases" (footnote omitted). Defendant's argument with regard to his research is without merit. As noted in *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988), "[p]artiality or bias which will allow a court to overturn an arbitration award must be certain and direct, not remote, uncertain or speculative." That Quinn had used Kooistra numerous times as an arbitrator simply does not evidence "certain and direct" partiality or bias. It is "uncertain or speculative," at best. The court did not err in rejecting defendant's "statistical analysis" as unpersuasive.

Defendant contends that Quinn or Kooistra should have disclosed the fact that Kooistra had arbitrated several of Quinn's divorce cases in the past. Defendant cites MCL 600.5075(1), which states:

> An arbitrator, attorney, or party in an arbitration proceeding under this chapter shall disclose any circumstances that may affect an arbitrator's impartiality, including, but not limited to, bias, financial or personal interest and the outcome of the arbitration, or a past or present business or professional relationship with a party or attorney. . . .

This statute does not mandate reversal in the instant case. Indeed, the statute took effect after the entry of the order submitting the instant case to arbitration. MCL 600.5070(2) specifically states that "[t]his chapter does not apply to arbitration in a domestic relations matter if, before the effective date of the amendatory act that added this chapter, the court has entered an order for arbitration and all parties have executed the arbitration agreement." The statute is inapplicable.

Moreover, there is no evidence of bias on the part of the arbitrator such that defendant should have been notified. Nor do we consider the fact that Kooistra arbitrated several of Quinn's divorce cases to be evidence of a professional or business relationship mandating disclosure. Kooistra acted as a "quasi-judge" in those cases and not as Quinn's associate. Further, we disagree that Kooistra had a financial interest in the arbitration proceedings that he should have disclosed. We also disagree that Kooistra's arbitration of several of Quinn's divorce cases created an appearance of impropriety requiring disclosure. In sum, while the "disclosure"

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motion. We find no basis on which to disturb the court's ruling. Moreover, it is clear from the arbitration opinion that the arbitrator had indeed read defendant's pertinent materials. Additionally, even assuming that the arbitrator made the disparaging comment at issue, we cannot conclude that it provided sufficient evidence of bias such that the award should have been vacated.

statute, by its own terms, does not apply to this case, defendant has failed to demonstrate an error requiring reversal even assuming that the statute *did* apply.[8]

Defendant next cites several instances in which Quinn contacted Kooistra about various matters in the instant case. Defendant contends that "[i]n light of this evidence and the substantial use of the Arbitrator by the Plaintiff's attorney, the arbitration award should be vacated." Once again, defendant's argument in this regard does not establish bias or establish the need for disclosure but is merely "uncertain or speculative." *Belen, supra* at 645.

Affirmed.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello

[8] Moreover, Quinn stated at the July 20, 2001, hearing mentioned in section I of this opinion that he and Kooistra "do a lot of arbitrations[.]" Therefore, defendant was in fact alerted to the alleged "business relationship" between Quinn and Kooistra and could have raised the issue far earlier instead of waiting to raise it in a motion for reconsideration. As noted in MCR 2.119(F)(3), a motion for reconsideration is used to correct "a palpable error by which the court and the parties have been misled[.]" A motion for reconsideration is not used to raise entirely new arguments.